

STATE OF MICHIGAN
COURT OF APPEALS

JACQUELINE JACOBS,

Plaintiff-Appellee,

v

ROBERT GEORGE,

Defendant-Appellant.

UNPUBLISHED

October 9, 2008

No. 276256

Lake Circuit Court

LC No. 96-004112-DP

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this paternity action, defendant appeals by leave granted a circuit court order denying his motion for relief from judgment under MCR 2.612(C)(1). We reverse and remand.

On June 25, 1996, plaintiff filed a paternity complaint alleging that defendant had fathered her son, Christopher. The friend of the court attempted to serve defendant by registered mail pursuant to MCR 2.105(A)(2), which provides that process may be served on an individual by

sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).

On July 2, 1996, Katrina Shepherd signed the registered mail receipt. Shepherd is defendant's daughter, and was a minor when she acknowledged receipt of the summons and complaint. The record does not conclusively establish whether defendant lived with Katrina in July 1996. On July 8, 1996, the friend of the court filed a certificate of service, and attached the registered mail receipt bearing Shepherd's signature.

On July 31, 1996, the circuit court entered a "Default Judgment Establishing Paternity," and ordered defendant to pay child support. One week later, the prosecuting attorney filed with the court an "Affidavit of Default and Nonmilitary Service." The affidavit averred that defendant had been personally served.

On August 19, 1996, the circuit court received and filed a letter handwritten by defendant, which stated verbatim the following:

I Robert George had know aware of a summon, I never receive it, because the address is incorrect. And also I request a blood test, because I Robert George is not claiming parnt.

The circuit court thereafter entered an income withholding order governing defendant's child support payments.

The court record reflects that the next action in this matter occurred in November 1998, when defendant wrote to the court and again requested a blood test. On November 3, 1998, the circuit court ordered a blood test, which ultimately excluded defendant as Christopher's biological father.¹

Despite the blood test results, defendant continued to pay child support as required by the income withholding order. In March 2006, defendant stipulated to a revised child support order requiring payment for Christopher and a second child born in 1998, whose paternity defendant has not challenged.

In October 2006, defendant filed a "Petition For Relief from Judgment Pursuant to MCR 2.612." In the petition, defendant alleged that he had never received personal service of the paternity action, and that "it is inequitable to the parties in this cause and the child for this court to allow this Order of Paternity to exit when in fact the Defendant is not the biological father." The circuit court denied defendant's motion for relief from judgment, reasoning in its bench opinion that although "service may have been improper," defendant "certainly had knowledge of this file. He had knowledge of the judgment. ... He's been paying his support. There's been, actually, additional stipulations and agreements between the parties regarding his paying of support, even after this paternity test was done."

Defendant contends on appeal that because he was never personally served, he lacked the opportunity to obtain appointed counsel. According to defendant, the absence of counsel denied him due process of law. However, defendant failed to raise this argument in the circuit court, and the circuit court did not address it. Because defendant has failed to preserve his due process claim, this Court reviews the unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that (1) error occurred; (2) the error was plain (clear or obvious); and (3) the plain error affected his substantial rights. *Id.* at 763.

The court rule governing the appointment of counsel in paternity actions provides, in relevant part,

¹ According to the circuit court's docketing entries, the blood test results were not filed with the court until 2006.

If the alleged father appears in court following the issuance of a summons under MCL 722.714, the court must personally advise him that he is entitled to the assistance of an attorney, and that the court will appoint an attorney at public expense, at his request, if he is financially unable to retain an attorney of his choice. [MCR 3.217(C)(2)].

Defendant did not “appear in court,” and therefore, the circuit court had no obligation to sua sponte appoint counsel for him. Counsel must be appointed only after a paternity defendant appears in the action and establishes indigency. *Artibee v Cheboygan Circuit Judge*, 397 Mich 54, 56; 243 NW2d 248 (1976). We thus find no plain error arising from the circuit court’s failure to appoint counsel for defendant before entering the default judgment.

Nevertheless, we agree with defendant that the circuit court erred by denying his motion for relief from judgment. We review for an abuse of discretion a circuit court’s decision whether to set aside a judgment. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). A circuit court abuses its discretion when it makes a decision that falls beyond the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, we review de novo a circuit court’s interpretation and application of the court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Pursuant to MCR 2.612(C)(1)(d), a circuit court may relieve a party from a “final judgment, order, or proceeding” if “[t]he judgment is void.” “A judgment which is void may be attacked at any time.” *DAIE v Maurizio*, 129 Mich App 166, 171; 341 NW2d 262 (1983). A motion for relief from judgment brought under MCR 2.612(C)(1)(d) “differs from a motion on other grounds in that there is no discretion on the part of the court.” Longhofer, Courtroom Handbook on Michigan Civil Procedure, § 2612.13, p 1076 (2006 ed). “A judgment is ‘void’ only if it is beyond the power of the court to render. In general, that will be the case only if the court lacked jurisdiction over the person or over the subject matter of the action.” 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2612.13, p 479. A court usually obtains personal jurisdiction over a defendant “by service of process.” *Isack v Isack*, 274 Mich App 259, 266; 733 NW2d 85 (2007). “[S]ervice of the summons is a necessary part of service of process,” and if the plaintiff completely fails to ensure service of the summons, the court does not obtain personal jurisdiction over the defendant. *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991).

Because defendant did not acknowledge receipt of the registered mail containing the summons and complaint, he was not properly served as contemplated by MCR 2.105(A)(2). Further, no record evidence supports that defendant actually ever received a copy of the summons and complaint. In light of the complete failure of service in this case, the circuit court abused its discretion by denying defendant’s motion for relief from the consequently void judgment against him.

We additionally find that defendant is entitled to equitable relief pursuant to MCR 2.612(C)(1)(e) and (f), which authorize relief from a judgment or order in the following circumstances:

(e) ...[I]t is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

The registered mail receipt filed with the circuit court clearly reflected the signature of someone other than defendant, who was a minor. The circuit court improperly entered defendant's default based on the filing of the certified mail receipt that obviously failed to establish personal jurisdiction over defendant. The circuit court records contain no evidence that plaintiff, the court, or the prosecuting attorney ever served defendant with notice of the entry of the default judgment, as required by MCR 2.603(B)(4). Moreover, defendant is not Christopher's biological father. Under the totality of the circumstances presented here, we conclude that the circuit court also abused its discretion by denying defendant relief because it is no longer equitable that the default judgment have prospective application.

Reversed and remanded for entry of an order granting defendant relief from the July 31, 1996 default judgment. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra